



REPUBLIC OF KENYA

High Court at Kakamega

Criminal Appeal 108 of 2010

*(Appeal arising from the Chief Magistrate's court Kakamega in Criminal*

*Case No. 541 of 2010 [P. N. ARERI, RM] dated 4<sup>th</sup> May, 2010)*

**BONIFACE HAMISI OBEDA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

The appellant was convicted on his own plea of guilty to five (5) counts of stealing contrary to **Section 275** of the Penal Code.

After he made his plea on mitigation that he was a student and the prosecution stated that he was a first offender, a Probation Officer's report was ordered by the court.

The Probation Officer stated in the report that the appellant was not fit for a non custodial sentence. The court then proceeded to sentence him to serve three (3) years imprisonment in each count, and the sentences were ordered to run consecutively. This was a total of 15 years imprisonment. He was granted 14 days to appeal.

From the record, he filed a memorandum of appeal in person from prison on 26<sup>th</sup> May 2010. However, by that time, the matter had already reached the Judge on revision.

On 15<sup>th</sup> June, 2010 a REVISION decision herein was made by **Lenaola, J.** which concluded thus –

**“I will therefore revise the sentences as follows –**

- i) On count 1 – three years imprisonment;**
- ii) On counts 2, 3 and 4 - three years imprisonment (all to run concurrently therefore three years in total).**
- iii) On count 5 – three years imprisonment.**

**In total therefore, the applicant shall serve nine years imprisonment instead of fifteen years imprisonment as earlier ordered.”**

Because the appeal filed by the appellant was already on record, it was fixed for hearing. It came up for hearing before me on 14<sup>th</sup> February, 2013.

The appellant submitted on appeal that he was aware that **Lenaola, J.**, had reviewed the sentences. He however, insisted that he wanted that all the sentences be made to run concurrently. The learned State Counsel Ms Ngovi acknowledged that the sentences had already been revised by **Lenaola, J.** but left the matter to the decision of the court.

Having considered this matter, I am of the view that the appeal herein is for dismissal. Though an appeal appears to have been filed before a ruling was made by the High Court on revision, the file had by the time of filing appeal already been placed before the Judge to exercise revision powers, and the Judge did so.

The powers of the High Court in revision under **section 364** are similar to those conferred on the same court on appeal under **Section 354, 357 and 358** of the **Criminal Procedure Code**.

In effect, the appeal to this same High Court, even assuming it was filed before the revision ruling was made, was overtaken by events once the decision in revision was made. Entertaining the appeal at this stage will be like sitting on appeal against the decision in revision by the learned Judge in the same matter. I do not have that jurisdiction to sit on appeal on the decision of **Lenaola, J.** in revision. Consequently, this appeal cannot succeed.

In conclusion therefore, the appeal has no merits. I dismiss the appeal.

***Dated and delivered at Kakamega this 18<sup>th</sup> day of April, 2013***

**George Dulu**

**JUDGE**